

United States <sup>2</sup>  
Circuit Court of Appeals

For the Ninth Circuit

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CHARLES H. PRAY,  
*Appellant,*

vs.

W. B. COPEs and J. E. HILL,  
doing business under the ficti-  
tious firm name of TRIANGLE  
IRON WORKS, and M. J.  
FITZGERALD and W. A.  
SAMSON, doing business under  
the fictitious firm name of  
NATIONAL FIRE ESCAPE  
LADDER COMPANY,  
*Appellees.*

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Brief of Appellees Copes and Hill

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W. B. COPES and J. E. HILL,  
doing business under the fictitious firm name of TRIANGLE IRON WORKS, and M. J. FITZGERALD and W. A. SAMSON, doing business under the fictitious firm name of NATIONAL FIRE ESCAPE LADDER COMPANY,  
Appellees.

**BRIEF OF APPELLEES COPES AND HILL.**

**STATEMENT OF THE CASE.**

The questions involved in this suit are not complicated and involve only the elementary principles of patent law. Such difficulties as have arisen are present only because the defendants and appellees, through ignorance and mistake, made certain answers to interrogatories which they afterwards found did not conform to the facts. After a decree in favor of plaintiff, the appellees presented the sit-

uation to the District Court in a petition for a rehearing, which was subsequently granted, and on a trial the plaintiff's bill was dismissed and a decree entered finding that the fire escapes made and sold by the defendants are not an infringement on plaintiff's patent or any of the claims thereof.

In his description of the patent in suit, plaintiff has omitted that part of the description of his device which shows on its face that the ladders manufactured and sold by the appellees do not infringe. The object of his invention, according to the statement in the patent, "is to provide a fire escape having second and third floor platforms *with a permanent connecting ladder* and a counterbalanced ground ladder slidable on the permanent ladder and latched in normal elevated position *with the rings of both ladders horizontally alined and positioned in close proximity to each other to form relatively wide steps.*" (See p. 1, lines 13-21 of patent.) This object is further described in the patent as follows:

"The construction provides a simple and practical fire escape *comprising a pair of closely nested ladders, one stationary and the other slidable thereon* with the slidable ladder normally supported *with the rungs of both ladders relatively horizontally alined and positioned in close proximity to each other to provide a wide step.*" (P. 1, line 108 to p. 2, line 3.)

From this description it is apparent that a permanent ladder between the balconies with a movable ladder slidable thereon, the rungs of both ladders aligned, when the slidable ladder is in its elevated

position, to provide a wide step, are essential elements of the invention. This permanent ladder is particularly mentioned in each one of the four claims of the patent as follows:

“1. A fire escape comprising two relatively spaced stationary platforms and an *intermediate stationary vertical ladder*, a slidable ground ladder, means for retaining said ground ladder in close sliding engagement with the stationary ladder, counter-balance means connected to the ground ladder, and manually operated means normally supporting the ground ladder in elevated position.

“2. A fire escape comprising two relatively spaced platforms and an *intermediate stationary vertical ladder*, vertical guide rods intermediate of and secured to the platforms, a counter-balance weight slidable on said rods, a ground ladder, means retaining the ground ladder in close sliding contact with the stationary ladder, cable sheaves journaled on the upper platform, cables secured to the weight and to the ground ladder and passing over the sheaves, and means carried by the lower platform for normally supporting the ground ladder in elevated position and movable to release said ladder.

“3. A fire escape comprising an upper and a lower platform having relatively alined open hatchways, the lower platform having opposed vertical grooves, a *vertical stationary ladder secured at opposite ends to the upper and lower platform respectively*, a vertically movable ground ladder slidable in said grooves, means for guiding the upper end of the ground ladder relative to the stationary ladder, counter-balance means connected to the ground ladder and a horizontally movable latch normally closing the bottom of one groove and forming a supporting abutment for the ground ladder.

“4. A fire escape comprising an upper and a lower platform having relatively alined open hatchways, the lower platform having opposed vertical grooves adjacent the hatchway, *an intermediate stationary ladder, the upper ends of the side rails of said ladder being secured to the upper platform and the lower ends of said side rails secured to the lower platform adjacent the vertical grooves*, a ground ladder slidable in said grooves, counterbalance means connected to the ground ladder and a manually operated means normally closing the lower end of one of the grooves and supporting the ground ladder in elevated position.” (Patent, p. 2, lines 5-57.)

Now the evidence shows conclusively that appellees never manufactured or sold any fire escape having a permanent fixed ladder between balconies, and an examination of the photographs and drawings of structures erected by them shows this to be the fact, as found by the District Court. It is true that the answers of all defendants to the plaintiff's interrogatories were so incomplete as to be misleading and untrue, but this, the court below found, was because of the inexperience of counsel who prepared them. Upon the application of the defendants for a rehearing, the decree was set aside and the defendants relieved from the prejudicial admissions contained in the answers to the interrogatories then on file.

It may here be pointed out that there are two separate defendants, or sets of defendants, the appeal herein being defended by Copes and Hill, doing business as Triangle Iron Works, alone. The relationship of these defendants and the circumstances

under which their first interrogatory answers were made are set forth in their supplemental affidavit on the motion to set aside the decree as follows:

“In that behalf these defendants say that they are co-partners doing business under the fictitious firm name of Triangle Iron Works and that said business consists in the fabrication and erection of ornamental iron; that on or about the 17th day of October, 1921, the defendant Samson representing himself as an officer or partner of the National Fire Escape Extension Ladder Company negotiated with these defendants for the manufacture and erection by them of such fire escape extension ladders as said Samson might order from them; that subsequently these defendants filled many orders for fire escape extension ladders given them by said Samson but that all of such work was, with the exception of a few ladders erected directly for owners of buildings, for said Samson and as manufacturers of an article sold by the other defendants.

“That at the time said defendants were served with process in this action they went to defendant Samson about the matter and that at said time said Samson assured them that he and the National Fire Escape Extension Ladder Company would assume the entire burden of the litigation and would save these defendants harmless from any liability on account thereof; that relying entirely on said assurances they entrusted the matter of the defense of the action to said defendant, W. A. Samson and thereafter were introduced to one, Victor H. Koenig, an attorney at law, whom said W. A. Samson employed for the defense thereof.

“That thereafter these defendants relying upon the advice and counsel of said Victor H.

Koenig signed the answer herein and also the answers to plaintiff's interrogatories without carefully reading the same or comprehending the import thereof; that their action in this regard was influenced by the assurances of defendant Samson and said Koenig that their joinder as defendants in this action was merely a legal formality and that they could not be held liable for any judgment which might be rendered herein.

“That after the decree was rendered in said action these defendants learned that their defense had not been properly presented and that their answer and answers to plaintiff's interrogatories were not in accordance with the facts, all of which is more particularly set forth in the joint affidavit of these defendants and M. J. Fitzgerald and W. A. Samson heretofore served and filed herein.

“That since said decree was rendered and since the said joint affidavit of these defendants was served and filed, these defendants have been informed and believe and therefore allege that said W. A. Samson is the sole owner of the business styled the National Fire Escape Extension Ladder Company and that said Samson individually is the sole owner thereof and transacting business under said fictitious name; that said W. A. Samson is insolvent and unable to respond to the judgment which may be rendered herein.”

We shall discuss the points raised by the plaintiff in the order suggested by him.



## ARGUMENT.

### Issue I.

#### Did the Defendants Infringe the Patent in Suit?

### Point I.

#### The Alleged Admissions of Defendants in Their Interrogatory Answers.

The appellant assigns the action of the court below in granting a rehearing as prejudicial error, and this will be answered more fully hereafter. It may here be said, however, that the point now under consideration cannot aid appellant, because it is elementary that the grant, absolute or conditional, of an application for a rehearing which has been made in due time, rests in the discretion of the court where the cause is first heard, and is not a subject of appeal. The court below, in setting aside the decree theretofore made and granting a rehearing, relieved the defendants from the prejudicial admissions contained in the answers to the interrogatories on file. Thereafter the defendants withdrew these answers to plaintiff's interrogatories and substituted others in lieu thereof. Under these circumstances appellant cannot avail himself of the answers which the court below allowed to be withdrawn because admittedly prejudicial and inadvertently made, to aid his position here. And, moreover, the first answers were not offered or received in evidence at the second trial. The record on this point is as follows:

MR. BROWN: That is all. Did I understand the court to enter the order permitting the exhibits in the former case to be included in this case?

THE COURT: I suppose so if there is no objection.

MR. BROWN: Is there any objection to the interrogatories propounded by us in the first case and your answers?

MR. HARPHAM: Your interrogatories and our last answers, or our amended answers to those interrogatories are all right, but not the original answers.

MR. BROWN: No, I understand that. The proofs, proceedings and interrogatories as well as the photographs under the stipulation and the bill, the original of which is on file, in the rehearing.

MR. HARPHAM: And all copies of patents that were offered in evidence or used.

MR. BROWN: Yes. (Transcript, p. 81.)

Yet a careful examination of the blue print filed with those first interrogatories will show that the structure there represented does not infringe plaintiff's patent, notwithstanding plaintiff's lengthy assertions to the contrary. The essential and important element of plaintiff's structure which is lacking in that represented in the drawing filed with defendants' first answer is the stationary vertical ladder between balconies, which, it will be remembered from our discussion of the Pray patent, is mentioned throughout the description and in each of the four claims. An examination of the blue print attached

to the interrogatories shows that there is no permanent fixed ladder between the two balconies. There is a movable ladder, extending in its operating position from the first balcony above the ground to the ground. This ladder can be raised to an elevated position by means of guides extending from the first balcony above the ground to the second balcony. It is to be noted that the blue print plainly states that "it shows the plan for a wrought iron ladder installed on a fire escape where the bottom of the lower balcony is more than twelve feet above the ground." Reference to the slidable or movable ladder shows that it is only slightly over ten feet long, while it is stated that the bottom of the balcony is more than twelve feet from the ground. It is obvious from the drawing that there is a short permanent ladder extending three or four feet below the top rail of the lower balcony, and that when the slidable ladder is lowered its length, added to the length of this short ladder, provides a continuous ladder extending from the first balcony to the ground. This is the only structure which might be considered a permanent ladder. The drawing shows no "intermediate stationary vertical ladder" between the stationary platform, with a movable ladder "slidable upon the permanent ladder and latched in normal elevated position with the rungs of both ladders horizontally aligned and positioned in close proximity to each other to form relatively wide steps", as described and claimed in the Pray patent. This permanent ladder extending from the first to the second bal-

cony is an essential element of the Pray combination.

Instead, therefore, of this blue print showing any infringement it, on the contrary, shows an entirely different structure. It is clear that all of the elements of the Pray patent are old in the art. Ladders have been used since the earliest times of mankind, and the claims of invention in this patent must, therefore, be limited to the specific combination of elements as covered in the claims of the patent. As was said by this court in the case of *Wilson & Willard Mfg. Co. vs. Union Tool Co.*, 249 Fed. 729:

“Combination of elements which are old in the art undoubtedly may be an invention, but the combination must be considered as an entirety or unitary structure. If defendant omits one or more of *the material elements which* make up the combination, he no longer uses the combination; and it is no answer to say that the omitted elements are not essential, and that the combination operates as well without as with them. (Citing cases.) It must also be established by one who alleges infringement of a combination that the entire combination, as a unitary structure and having substantially the same mode of operation is present in the alleged infringing machine.” (P. 731.)

The combination in the Pray patent is an essentially different structure from that represented in the blue print. This difference between the structure described in the Pray patent and that represented in the blue print was concisely pointed out by Judge Bledsoe in the trial of the suit. He said:

THE COURT: Mr. Brown, your patent requires an intermediate stationary and vertical ladder between the two spaced stationary platforms?

MR. BROWN: Yes, sir.

THE COURT: And that the movable ladder shall slide upon and in close proximity with that intermediate stationary ladder?

MR. BROWN: Yes, sir.

THE COURT: Now where is that in the defendants' device?

MR. BROWN: In the defendants' device we contend that the ladder B is a stationary ladder.

THE COURT: But they don't use that to go from one platform to the other. It is not intended for that, obviously, and even a man at a fire couldn't use it.

MR. BROWN: That may be very true but what is B if it is not a ladder?

THE COURT: Why it is only a support, obviously.

MR. BROWN: And it has rungs in the support.

THE COURT: No, it hasn't rungs in the support. It has iron bars to prevent distortion. That is all it is.

MR. BROWN: But our contention is—or how many rungs does it take to make a ladder?

THE COURT: That depends on how far you are going. If you had a hundred-foot ladder it would take more than otherwise but your patent calls for two platforms with a stationary ladder between them

and a movable ladder operating upon the stationary ladder. That is your device. There isn't anything to compare with it in the defendants' device. If there is I would like to have you point it out.

MR. BROWN: Aren't we allowed a range of equivalence, if the court please? Is this patent not to be sustained simply because they don't run the rungs all the way up but set them a certain distance from the top?

THE COURT: If your patent calls for a contrivance that enables you to go from one story to the other and they don't use that and don't intend to use it, then they haven't copied your device. They have got a stairway of their own.

MR. BROWN: Yes, but they didn't install it.

THE COURT: It doesn't make any difference, they have a stairway of their own there which is used to go from the second to the third story, and you have installed this stairway for them to go up. (Further argument by Mr. Brown and citation of authorities.)

THE COURT: It is an essentially different structure and I don't see any infringement so the complaint will be dismissed and defendants' counsel will prepare a decree.

The device mentioned as "B" in the foregoing is the pair of guides or stringers extending above the railings of the first balcony on which the ground ladder may be raised to its elevated position. These stringers have two iron bars spaced equally distant

between the first and second balcony, to prevent distortion.

The basic and fundamental difference between the structure represented by the Pray patent and that manufactured and sold by the defendants is that there is no intermediate stationary ladder between the stationary platforms as described and claimed in the former. And it is absurd to say that the two stringers on which the movable ladder as erected by the defendants is raised, is a stationary ladder, because there are two stiffeners for this frame in fourteen feet. It is obvious, without the presentation of evidence, or citation of authority, that two of these stiffeners, placed between the upright guides in a total distance of fourteen feet could not make the structure a "permanent ladder" by the wildest stretch of imagination. As was very aptly remarked by the court during the testimony of the engineer describing the structure claimed to be an infringement:

Q. (By Mr. Harpham): Would it be possible for a man to go up and down on those rungs from the second balcony to the third balcony, or from the third balcony to the second?

A. It would be very easy to go down.

Q. (By the Court): You could go down without any rungs at all or any structure. (Transcript, p. 75.)

Point II.

The Alleged Los Angeles Ordinance.

There was no proof made by plaintiff of the existence of Ordinance No. 28700, or any other ordinance of the City of Los Angeles requiring a permit to erect fire escapes. The copy of such alleged ordinance set out on page 28 of plaintiff's brief is, therefore, entirely outside the record and should not be considered by this court.

Point III.

As to the Blue Print Attached to the McKeag Affidavit.

Plaintiff expressly states, when taking up this point in his brief (p. 29), that "the affidavit of C. E. McKeag, on file with the appeal papers in this cause, although not numbered as an exhibit", shows certain things. This affidavit was not introduced in evidence, and it is entirely outside the record and should not be considered by this court. Yet if it is to be considered, the blue print attached to the affidavit is the same one attached to the first set of defendants' interrogatories. The structure represented by this blue print was particularly discussed under Point I.

Point IV.

As to the Affidavit Supporting Defendants' Motion To Vacate the Interlocutory Decree.

It is inconceivable how any person reading the defendants' affidavit and carefully examining the



photographs which are a part of it, could reach the conclusions stated by counsel under this point in their brief. The photograph which most clearly shows the structure manufactured by these appellees is designated as Exhibit "B" and appears on page 34 of the transcript. The guides which plaintiff is seeking to call a "permanent ladder" between the balconies are designated on this photograph as 6. They have one stiffener extending horizontally between them, and it is on this structure, if it is a ladder of any kind, that persons would have to go up or down between balconies. The comment of the district judge on the claim that this is a ladder of any kind is a complete answer to it.

And we further assert with all positiveness that the blue print attached to the original answers of the defendants to plaintiff's interrogatories shows exactly the structure represented on this photograph, without any permanent ladder between the two balconies and only the guides as shown. The original answers showed clearly that counsel who prepared them did not, or could not, read the blue print which he made a part of them, because there is no permanent ladder between the balconies shown on it. He mistakenly pointed out minor differences in construction, and the error was so obvious that the court below relieved the defendants from the prejudicial situation these answers placed them in. No one experienced in reading blue prints and familiar with mechanical construction could possibly make the answers which the defendants made to

questions 3 and 9 of plaintiff's interrogatories with the blue print which was attached to those answers before them.

Defendants have consistently maintained, and supported their position with uncontroverted evidence, that, as stated by them in their affidavit, "they have never built, or had built for them, any second and third story platforms with a permanent ladder extending from one to the other; that they have never made or installed any movable ground ladder which was held in sliding contract or engagement, or any contact or any engagement with the permanent ladder which in fire escapes extends from the second to the third story platform". (Appellant's Brief, p. 15.)

#### Point V.

##### The Times Structure.

These appellees maintain that the structure which they manufactured and which was later installed by their co-defendants upon the Times building in Los Angeles is the only type which they ever manufactured and that it does not infringe the plaintiff's patent. There is no permanent ladder between the second and third balconies in this structure, and the photographs in evidence clearly show this. Plaintiff maintains that there is nothing in the patent in suit indicating the number of rungs or rounds which a ladder between balconies must contain to be a ladder. Yet he includes in his argument Webster's definition of a ladder as "a frame, usually, portable,

of wood, metal or rope, for ascent and descent, consisting of two side pieces to which are fastened cross strips or rounds forming steps.” (Appellant’s Brief, p. 39.) Any ladder, if it is to be used for a ladder, must be reasonably usable for ascent and descent. The photograph of the Times structure shows two rods inserted horizontally between the guides extending from the second to the third balcony. The distance between these balconies was testified to be 12 to 14 feet. These rods, it was proved, were put in to stiffen the frame and prevent distortion, and are substantially equally distant from the top of the second floor balcony, the bottom of the third floor balcony, and from each other. It is absurd to contend that two uprights extending this distance and with two horizontal rods or rungs are a ladder usable for ascent and descent.

Of course, the patent in suit does not state how many rungs the permanent ladder must contain. Obviously the number would depend upon the length of the ladder, but two rungs in fourteen feet could not under any circumstances make a ladder.

Appellant attempts to invoke in this case the doctrine of equivalents, which can have no possible application to the case at bar. The defendants, in their structure, have not sought to substitute anything for the permanent fixed ladder between balconies which the Pray patent claims; they do not provide any means for ascending or descending from the second floor balcony to the third floor balcony; they do not build any contrivance which makes relatively wide

steps for the ladder between these balconies. They provide only a ladder for use from the first floor balcony to the ground, this ladder slidable upon guides. Removal of the permanent ladder changes the entire theory and use of the plaintiff's structure, and the doctrine of equivalents has, therefore, no application here.

As was said in the case of *Wilson & Willard Mfg. Co. vs. Union Tool Co.*, 249 Fed. 729, 731:

“To make one mechanical device the equivalent of another, it must appear, not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation.”

Where, may we ask, have the defendants provided any equivalent for the permanent fixed ladder in the Pray patent, or anything by which the same effect (in this case a structure to pass up and down from balcony to balcony) can be produced? There is no equivalent of this in the defendants' structure, and this omission constitutes the distinctive difference between them.

## ISSUE 2.

### Point I.

#### The Construction of the Patent in Suit.

The defendants not only pleaded the Pauly patent in their answer, but relied upon it in the trial of the case and introduced it in evidence as Defendants' Exhibit “A” (Transcript, p. 82) to show the state of the prior art. The Pauly structure was patented

May 25, 1915, over five years before the Pray patent was issued. This patent provides for counter-balanced stairs latched in normal elevated position above the balcony on the second floor of a building, but which may be lowered to provide a means of descent from this balcony to the ground. The only substantial mechanical difference between the structure described in this patent and the one manufactured by the appellees is that in the Pauly patent the movable stairs on being lowered swing outward from the building to provide a stairway at an angle instead of a vertical ladder. The claims of the Pauly patent show that it provides for guideways from the second to the third balconies on which these stairs may be raised when not in use in practically the same style of construction as used by the appellees. No use of such guides as a ladder is claimed; indeed, the patent recites that "suitable stairs 17 may lead in the usual way from an opening in each balcony to the next lower balcony." (Patent, Defendants' Exhibit "A", p. 1, lines 88 to 91.) This clearly shows the state of the prior art and that the Pauly patent is for a structure mechanically identical with that manufactured by appellees.

## Point II.

Appellant asserts with evident seriousness that the Pray patent was for a basic and important invention, and he cites Hopkins on Patents as authority for the liberal construction of such a patent. It is, of course, admitted that pioneer patents are en-

titled to a liberal construction, and that there is, as to them, a wide range of equivalents. But the Pray patent could not possibly come within this class. Every element in the Pray patent is old in the art, and this court has stated in the case of *Wilson & Willard Mfg. Co. vs. Union Tool Co.* (*supra*) that the claim for a combination is not infringed, if any one of the elements is omitted, without substitution of an equivalent. The same elementary rule of construction announced by this court as applying to such cases has also been reached in the recent case of *William B. Scaife & Sons Co. vs. Falls City Woolen Mills*, 194 Fed. 139, at p. 146, where it was said:

“Furthermore, it is a general rule that the improved combination for which a patent is granted must be limited by the elements therein specified. If the old elements were combined in a substantially different way, or if the purifying result be accomplished by a different combination in defendant’s apparatus, there might be no infringement. In other words, patents for improved combinations must be construed strictly, *there being no legal right to a monopoly in cases where there is a mere improved combination except in respect to what is substantially that very combination*, the law leaving it open to all others to make any other combination of old things which is not substantially the same as the one described in the patent. We think this plainly results from the decisions in many cases, and, furthermore, we think the rule is particularly applicable to cases like this. After we had written to this point, there came from the clerk in due course, a copy of the opinion of the Circuit Court of Appeals of this circuit

in the case of the Union Paper Bag etc. Company v. Advance Bag Company, 194 Fed. 126, decided January 3, 1912, in which the court, speaking through Judge Warrington, said:

“ ‘It is settled that a claim for a combination is not infringed if any one of the elements is omitted without substitution of an equivalent’.

“ ‘This proposition was based upon what the Supreme Court in an opinion by Mr. Justice Day had said in Cimiotti Unhairing Co. vs. Am. Fur Refining Co., 198 U. S. 410, 25 Sup. Ct. 702, 49 L. Ed. 1100, as follows:

“ ‘In making his claim the inventor is at liberty to choose his own form of expression; and, while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, *no one is an infringer of a combination claim unless he uses all the elements thereof.* Shepard v. Carrigan, 116 U. S. 593, 597 (6 Sup. Ct. 493, 29 L. Ed. 723); Sutter v. Robinson, 119 U. S. 530, 541 (7 Sup. Ct. 376, 30 L. Ed. 492); McClain v. Ortmyer, 141 U. S. 419, 425, (12 Sup. Ct. 76, 35 L. Ed. 800); Wright v. Yuengling, 155 U. S. 47, (15 Supt. Ct. 1, 39 L. Ed. 64); Black Diamond Co. v. Excelsior Co., 156 U. S. 611 (15 Sup. Ct. 482, 39 L. Ed. 553); Walker on Patents, 349.’

“ ‘It may also be remarked that in such cases the range of equivalents is narrow.’”

So, also, the Circuit Court of Appeals for the Third Circuit, in Underwood Typewriter Co. vs. Royal Typewriter Co., 224 Fed. 477, said:

“ ‘In an overcrowded art, where a broad generic invention is not possible, a defendant who

omits altogether one element of a combination cannot be held liable as an infringer, even though he makes another element do the double work." (P. 479.)

And in *McCaskey Register Co. vs. Mantz*, 224 Fed. 495, the court said:

"Since the claim calls for the two elements, it cannot be infringed by a device which employs one only, where there is nothing of a pioneer character in the patentee's device." (P. 496.)

### Issue 3.

The Asserted Error of the District Court in Granting a Rehearing.

It has so long been held that the action of the District Court in granting or denying a rehearing will not be reviewed, that the citation of authorities is almost superfluous. In *Foster's Federal Practice*, Fifth Edition, Vol. II, Sec. 445, p. 1399, it is said:

"The grant or refusal, absolute or conditional, of an application for a rehearing, which has been made in due time, rests in the sound discretion of the court where the cause is first heard, and is not a subject of appeal." Citing numerous authorities.

The defendants had obviously been misled into signing and swearing to answers to plaintiff's interrogatories which did not correctly state the facts, and which even a casual inspection of the drawings of the structures involved shows did not state the facts. It was therefore not only proper but incumbent upon the court, particularly in an equity case, to relieve the defendants from this prejudice for



which they were not responsible. Any other conclusion would have resulted in a grievous miscarriage of justice.

### CONCLUSION.

We confidently assert that the entire record in this case shows conclusively that the defendants have not infringed the plaintiff's patent; that they manufactured a totally different structure, following closely the lines of the Pauly patent, which anticipated the Pray patent; that their position has been entirely consistent throughout, and that they are entitled to the decree entered by the District Court.

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